91-1702

CASE NO. _____

FILED
FEB 27 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

CARL W. CORTEZ
Petitioner

-vs-

First City National Bank of Houston,
Federal Deposit Insurance Corporation,
First City Texas, Houston,
Successors of Interest, et al

Petition for a Writ of Certiorari to
The United States Court of Appeals for
The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Carl W. Cortez, pro se
801 Main #42
Dunedin, Florida 34698
(813) 736-8125

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QUESTIONS

Whether the fundamental right of all citizens to Due Process of Law and Equal Protections of the Law as guaranteed under the Fourteenth Amendment to the Constitution are jeopardized when a branch of the United States Government commits criminal acts upon a United States District Court and the criminal acts therein committed by the United States Government are condoned by two separate United States Court of Appeals?

Whether a United States court of Appeals and all Lower Courts must execute the law in accordance to the mandates of the Supreme Court of the United States and any Order of a Lower Court in opposition to a ruling of the Supreme Court denies a party equal protection of the law as guaranteed under the Fourteenth Amendment to the Constitution?

Whether the right to Due Process of Law under the Fourteenth Amendment to the Constitution is violated when a United States Court of Appeals does not reverse a Lower Court's Order dismissing a case for failure to state a claim and it had been shown to the Court of Appeals that the Lower Court would not accept, nor docket, the Amended Complaint, ordered by the Lower Court and filed in a timely manner?

Whether the right to Equal Protections of the Law and Due Process of Law under the Fourteenth Amendment to the Constitution is violated when a United States Court of Appeals does not reverse a Lower Court's Order when evidence was presented to the Court of Appeals showing that a Motion for Rehearing, filed in a timely manner, was not accepted by the Lower Court and was not ruled on by the Lower Court?

Whether a United States Court of Appeals must follow the mandates of the Circuit and rule equally under the guidelines of the Circuit mandates and a failure of the court to follow their own mandates in a specific case would deny that party his right to equal protection of the laws under the Fourteenth Amendment of the Constitution?

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REFERENCES TO OTHER OPINIONS

Order of Dismissal, April 11, 1990, United States District Court, Middle District of Florida, Tampa Division, Case No. 90-12-CIV-T-17-B.

Order of Dismissal of Appeal, Eleventh Circuit Court of Appeals, December 12, 1990, Case No. 90-3718.

Petition for Writ in the Nature of Mandamus and/or Writ of Prohibition filed in the Eleventh Circuit Court of Appeals on July 5, 1990. Petition was denied without comment.

JURISDICTION OF THIS COURT

The Appeal of the Appellant, Cortez, was dismissed, without comment, on October 30, 1991. (A-1)

The Petition for Rehearing was denied without comment on December 2, 1991. (A-1)

Jurisdiction of this Court is invoked pursuant to 28 USC § 1254 and Rule 10(a) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE

COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE BY UNITED STATES DISTRICT COURT, TAMPA DIVISION

On January 5, 1990, the Appellant, Cortez, a resident of the City of Dunedin, in the State of Florida, filed in the United States District Court, Tampa, Division, an Independent Action for Relief from Judgment - Fraud under the jurisdiction of Federal Rule of Civil Procedures 60(b) (A-20). Three of the five Defendants named in the Complaint failed to respond to the Complaint and an entry of default was entered on the docket by the Clerk of the Court, Tampa Division.

On March 16, 1990, the Defendant, Federal Deposit Insurance Corporation, (FDIC) filed an Affidavit in Support of their Motion to Set Aside Defaults (R-28). The Plaintiff, Cortez, filed a Motion in Opposition to the FDIC Motion to Set Aside Default (R-31) wherein evidence was given to the Court that proved that the Affidavit of the FDIC contained false statements and was submitted to the Court by the FDIC to deny the Plaintiff his right to be heard by the Court.

On March 13, 1990, the Defendant, First City National (FDIC's Successor of Interest), filed a Motion to Dismiss and an Affidavit in Support of their Motion to Dismiss (R-23). The Motion in Opposition to First City National's Motion to Dismiss, filed by the Plaintiff on March 28, 1990 (R-35) gave evidence to the Court that the Affidavit of First City National contained false statements and was submitted to the Court by First City National to deny the Plaintiff his right to be heard by the Court.

On April 10, 1990, Defendant, NBC Spring Branch (FDIC's Successor of Interest) filed a Motion to Dismiss and two Affidavits in Support of their Motion to Dismiss (R-37). The Court dismissed the case on April 11, 1990, before the Plaintiff could respond to the Motion to Dismiss filed by NBC. The Plaintiff filed a Motion for Reconsideration of the Court Order of April 11, 1990 (R-64) in a timely manner and therein gave evidence to the Court

that the two Affidavits submitted to the Court on April 10, 1990 by Defendant NBC (FDIC) did contain false statements and that the false statements were made to deceive the court and to deny the Plaintiff his right to be heard by the Court.

COURSE OF THE PROCEEDINGS & DISPOSITION OF THE CASE BY THE ELEVENTH CIRCUIT COURT OF APPEALS

A Petition for a Writ In the Nature of Mandamics and/or Writ of Prohibition was filed in the Eleventh Circuit Court of Appeals on or about July 5, 1990, wherein evidence was presented to the Court of Appeals that false Affidavits had been submitted to the United States District Court, Tampa, and that the swearing of false Affidavits is a criminal act that was committed in the State of Florida and therefore the Defendants were subject to the Long Arm Statutes of Florida, whereunder the United States District Court, Tampa, and the Eleventh Circuit Court of Appeals did have jurisdiction over the Defendants. The Petition was denied without comment.

On or about December 12, 1990, the Eleventh Circuit Court of Appeals denied jurisdiction and dismissed the Appeal.

COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE BY THE UNITED STATES DISTRICT COURT, HOUSTON DIVISION

On April 11, 1990, the United States District Court, Tampa Divisiion, Ordered that case number 90-12-CIV-T-17-B be transferred to the United States District Court, Houston Division. The case was transferred, by the Clerk of the Tampa Court, on April 11, 1990, the same day of the Court's Order of Transfer. Plaintiff filed a Motion to Return the Case File to the State of Florida on May 7, 1990, and a Motion of Hearing to Set Aside the Judgment of the United States District Court, Tampa Division, and For Sanctions Against Defendant First City - Texas Houston on March 29, 1991, wherein the Plaintiff gave evidence to the Court that the United States District Court, Tampa Division, had Ordered the Plaintiff to file an Amended Complaint (A-7) within ten days of the Court Order of April 11, 1990. Plaintiff did file his Amended Complaint in a timely manner in the Tampa District Court and in the Houston District Court. The Amended Complaint of the Plaintiff's was returned to the Plaintiff by the Tampa District Court, and the Plaintiff's Amended Complaint was also returned to the Plaintiff by the Houston District Court. The United States District Court, Tampa, Ordered the Plailntiff to file an Amended Complaint within ten days and, within the same Order, dismissed the case, as to First City National Bank - Houston, for

failure to state a claim. On April 4, 1991, the United States District Court, Houston, entered a Final Order of Dismissal and Injunction, for failure to state a claim even though the Court had been made aware that the Plaintiff's Amended Complaint had not been accepted by the Court.

Plaintiff did further give evidence to the Court that under the Federal Rules of Civil Procedure 59(e), the Plaintiff had a right to file a Post Trial Motion to the Order of the Tampa Court, April 11, 1990, sending the case to Houston, Texas. The Plaintiff did file a Post Trial Motion in a timely manner, with the Clerk of the District Court, Tampa Division, and within three days after the filing of the Post Trial Motion, the Clerk of the Tampa District Court returned the Plaintiff's Post Trial Motion to the Plaintiff. The Post Trial Motion was not accepted by the Tampa District Court, and the Post Trial Motion was never entered on the docket of the Tampa District Court. No Order of the Court denying the Plaintiff's Post Trial Motion was ever entered on the docket of the Tampa District Court. Plaintiff also gave the Houston District Court evidence that on May 15, 1990, an endorsed Order was issued by the District Court, Tampa Division, denying the Plaintiff's Post Trial Motion, and that the endorsed Order of May 15, 1990 was signed as a false document, a document not submitted to the Court by the Plaintiff, that the Plaintiff's Post Trial Motion was never accepted by the Court, that no Post Trial Motion could have been sent to the Judge for consideration by the Clerk without first being placed on the docket, and finally, an Order of the Court on a Post Trial Motion would have to be posted on the docket by the Clerk of the Court.

The United States District Court, Houston, would not address the evidence before the Court, nor would the Court permit, upon hearing, the presentation of further evidence that proved the Federal Deposit Insurance Corporation and other Defendants had committed three acts of perjury in a United States District Court. The Houston District Court also ignored the evidence that showed the Plaintiff would be denied his Constitutional Rights if the Court ruled without the Plaintiff's Amended Complaint being first considered by the Court, and that there was never a final ruling of the Order of the Tampa District Court, April 11, 1990, because the Tampa Court failed to rule on the Plaintiff's Post Trial Motion.

On April 4, 1991, the Houston District Court entered an Order of Dismissal and Injunction with no mention of the perjury and fraud committed upon the Courts by the Defendants and further, the Court refused to address the right of the Plaintiff to have the Court accept and review his Amended Complaint nor would the Court address the issue of the Tampa District Court's failure to rule on the Plaintiff's Post Trial Motion.

COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On September 20, 1991, the Plaintiff, Cortez, did file an Appeal from the United States District Court for the Southern District of Texas, Houston Division. The facts and evidence encompassed in the Appeal showed the Court of Appeals that the District Court Judge had erred when the Judge failed to rule on the evidence before the Court that proved that the Defendants had submitted three false Affidavits to the Court and had committed fraud upon the court. The Appeal of Cortez further showed the Court that the District Court Judge erred when he dismissed the case for failure to state a claim, when it had been shown that the Tampa District Court Ordered Cortez to file an Amended Complaint within ten days from date of the Court's Order, April 11, 1990, that Cortez did file an Amended Complaint in a timely manner and that the Tampa District Court and the Houston District Court would not accept the Plaintiff's Amended Complaint. Further, the Appeal of Cortez showed that the District Court Judge erred when he failed to consider the fact that the Post Trial Motion filed by Cortez in response to the Order of the District Court, Tampa, April 11, 1990, had not been accepted by the Tampa Court, had not been docketed by the Clerk of the Tampa Court, nor had any ruling by the presiding Judge of the Tampa Court been entered on the Tampa docket.

On December 2, 1991, the Appeal of Cortez was denied without comment, leaving unanswered questions of responsibility for punishment of the persons committing criminal acts on a Federal Court, the right of a party to file a Post Trial Motion, the right of a Plaintiff to have his Amended Complaint accepted and reviewed by the Court, and the authority of a District Court to issue an unjust, unspecific and unlimited permanent Injunction.

SUMMARY OF THE ARGUMENT

A. The Court of Appeals for the Fifth Circuit erred when the Court denied the Appeal of this Petitioner (Cortez) without review or comment on the evidence and facts contained in Cortez's Appeal. The facts and evidence showed the Court that the Federal Deposit Insurance Corporation and the other Defendants had committed three separate criminal acts of perjury by their submissions of three false Affidavits to the United States District Court, Tampa Division. Further, the facts and evidence contained in the Appeal of Cortez showed that the Federal Deposit Insurance Corporation and the other Defendants committed other acts of fraud upon the Courts in their attempt to cover up and deny false Affidavits. When the Court denied the Appeal of

Cortez. The Court's Order is in opposition to the Mandates of the Supreme Court of the United States, whereunder the Supreme Court has ruled the Lower Court must reverse a favorable judgment that was obtained by the act of fraud upon the Court. For the Fifth Circuit Court to deny Cortez his right to have the Lower Court's decision reversed does deny Cortez his right to Equal Protections of the Laws under the Fourteenth Amendment.

B. The Court of Appeals for the Fifth Circuit erred when the Court failed to reverse the Order of the Lower Court dismissing the case for "Failure to State a Claim." The Plaintiff was ordered by the Court to file an Amended Complaint within ten days. The Amended Complaint was filed by the Plaintiff in a timely manner, and within three days after filing the Amended Complaint, the Court returned the Amended Complaint to the Plaintiff. The Court's failure to accept and review the Plaintiff's Amended Complaint before deciding the Plaintiff had failed to state a claim, denied the Plaintiff Due Process of Law under the Fourteenth Amendment.

C. The Court of Appeal erred when the Court failed to reverse the Order of the Lower Court when evidence was presented to the Court in the Appeal of the Petitioner that the Lower Court had never ruled on his Post Trial Motion. Cortez filed his Post Trial Motion in the United States District Court, Tampa Division, in a timely manner and within three days after the filing of the Post Trial Motion, the Clerk of the Court returned the Motion with a notation that "this Motion should be sent to Texas." The Post Trial Motion of the Petitioner was for reconsideration of the Court's Order transferring the case to the Houston District Court, and a Transferee Court cannot directly review the Transfer Order itself. The failure of the Court to accept and Docket the Post Trial Motion of the Petitioner violated his right to Equal Protection of the Laws and Due Process of Law under the Fourteenth Amendment.

D. On April 4, 1991, the Houston District Court improperly issued a Permanent Injunction enjoining the Plaintiff, and/or anyone acting on his behalf, from filing any actions against any Defendant or Agent, Successor or Attorney of any Defendant which relates in whole or in part, directly or indirectly, to the subject matter of this lawsuit. The Court of Appeals for the Fifth Circuit erred when the Court failed to vacate the Injunction when it was shown to the Court that the Permanent Injunction was unspecific and unlimited, and was improperly issued by the District Court. Further, this failure of the Court to follow the mandates of their own circuit denied the Appellant equal protection of the laws under the Fourteenth Amendment and the right to petition under the First Amendment.

ARGUMENT
I

A. The Fifth Circuit Court of Appeals' denial of the Appeal of the Appellant (Cortez) does sanction the departure of the District Court from the accepted and usual course of judicial procedures, and such departure does call for the exercise of this Court's power of supervision. The Judges of the Court of Appeals had an ethical duty to take appropriate measures to uphold the Independence and Integrity of the Judiciary when it was shown to the Court of Appeals that the Lower Court had sanctioned the commissions of criminal acts in a United States District Court by a branch of the United States Government.

B. On March 16, 1990, the Federal Deposit Insurance Corporation filed, in the United States District Court, Tampa Division, a Motion to Set Aside Default (R-27) and Affidavit of Federal Deposit Insurance Corporation (R-28) in the United States District Court, Tampa Division, wherein the FDIC swore, "Defendants' ability to timely respond to the Plaintiff's Complaint in this matter was hampered by the incorrect denominators of the Defendants in the style of this case and the improper service of process upon two former attorneys for Defendant, neither of whom are authorized agents of Bank One." This sworn statement in the Affidavit of the FDIC was shown to be false. In the Plaintiff's Motion in Opposition to Set Aside Defaults, wherein the Affidavit of the process server showed that the service of process was made upon the FDIC and Bank One, not upon the two former attorneys for the Defendants (R-31). The false statements in the Affidavit of the FDIC were for the purpose of deceiving the Court and to secure removal of the Defaults. Any person making a false statement in an Affidavit is guilty of perjury, United States v. Smull, 236 U.S. 405 (A-28).

C. On March 13, 1990, Defendant First City National and the FDIC, as Successors of Interest, filed an Affidavit in the United States District Court, Tampa Division, in support of their Motion to Dismiss (R-23), wherein the Defendant's swore "First City Texas Houston National Association is not now nor has it ever been under the Ownership or Receivership of the Federal Deposit Insurance Corporation". The Defendants duly swore in their Affidavit, "First City Texas Houston National Association does not sell, consign or lease, by any means whatsoever tangible or intangible personal property through brokers, jobbers, wholesalers, or distributors to any person, firm or corporation in the State of Florida." The Plaintiff filed an Opposition to First City's Motion to Dismiss (R-33), and a supplement Memorandum in Opposition to First City's Motion to Dismiss on March 28, 1990 (R-35), wherein the

Plaintiff did give evidence to the Court that First City National did make false statements in their Affidavit. The evidence presented showed the Court that the Federal Deposit Insurance Corporation owned, 1,030,636 shares of First City National stock, and that under Federal Statutes 12 U.S.C.S. § 1823 (A) and (E), "The term 'acquire' means to acquire directly or indirectly ownership of assets or assumptions of liabilities;" (A-6). First City National's sworn statement that First City was not nor has ever been under the ownership of the FDIC was false. Further evidence was given to the Court in Plaintiff's supplemental Memorandum in Opposition to Dismiss, which showed the Court that First City was a first lienholder of property, worth in excess of Ten Million Dollars in Hillsborough County, Florida, and the records in the Hillsborough County Clerk's Office show that First City National has done millions of dollars in business in Hillsborough County, Florida. The sworn statement in the Affidavit of First City that First City did not sell, consign or lease tangible or intangible property in the State of Florida was false. Any person making a false statement in an Affidavit is guilty of perjury (United States v. Smull, supra).

D. On April 10, 1990, the Defendant, NBC Houston, Federal Deposit Insurance Corporation, Successors of Interest, filed an Affidavit in Support of the Motion to Dismiss in the United States District Court, Tampa Division (R-37), wherein the Defendant swears, "The Federal Government has never had ownership, conservatorship, or receivership of NBC Houston." On July 22, 1989, the Federal Deposit Insurance Corporation issued a press release to the Houston newspapers (JA-1) wherein the FDIC announced they were turning control of NBC Houston over to Equimark Corporation of Pittsburgh. The press release further stated that the FDIC will assume 250 million dollars of NBC Houston liabilities as a loss.Another article appearing in the Houston papers on April 17, 1990 (JA-1) stated the acquisition of NBC-Houston had not yet been completed. The swearing of the Defendant that the FDIC never had ownership, conservatorship or receivership of NBC-Houston is false. The Federal Deposit Corporation Act 12 U.S.C.S. § 1823 (E) (A-6) states in part, "the term 'acquire' means to acquire, directly or indirectly, ownership or control through (i) an acquisition of shares, (ii) an acquisition of assets or assumption of liabilities." The statement in their Affidavit that the Federal Deposit Insurance Corporation never had ownership, conservatorship or receivership, was false. A person making a false statement in an Affidavit is guilty of perjury, United States v. Smull, 236 U.S. 405 (A-28).

E. On August 27, 1991, Larry D. Goodwyn filed a form of Appearance of Counsel with the Fifth Circuit Court of Appeal wherein Mr. Goodwyn acknowledged that he was a regional attorney for the Federal Deposit

Insurance Corporation acting as Receiver for First City National Bank of Houston, M Bank Houston, M Bank Memorial, Peoples Bank - NBC Spring Branch and Petrobank. This acknowledgement by the FDIC that they were, in fact, the Receiver for all five of the Defendants and the evidence contained in the case file does show that the Federal Deposit Insurance Corporation did, in fact, submit perjured Affidavits to a United States District Court, in violation of Federal Statutes 18 USCS § 1621 (A-6). Further evidences contained in the case file does also show that the Federal Deposit Insurance Corporation was a partner with all the Defendants in the commission of fraud upon the Court in two (2) United States District Courts and in two (2) United States Courts of Appeal.

The purpose of the fraud upon the Court committed by the FDIC and the other Defendants was to prejudice the Courts against the Plaintiff and deny him his right to be heard, which they did so successfully, and the purpose of the perjured Affidavits was to have the defaults removed by the Court and to deceive the Court into believing the Court did not have jurisdiction. No branch of the United States Government should be permitted to abuse the power of the United States Government, and for a branch of the Government to abuse that power through the commissions of criminal acts and to use their power, influence and resources to have their criminal acts condoned in two (2) United States District Courts and two (2) United States Court of Appeals is a direct attack by a branch of the United States Government on the Fourteenth Amendment to the Constitution granting all citizens the right to "Due Process of Law" and "Equal Protection of the Laws," and is therefore a threat to the civil liberties of all citizens in the United States.

II

A. On April 11, 1990, the United States District Court, Tampa Division, ordered that the case be sent to the Houston District Court on jurisdictional grounds, dismissed the case for failure to state a claim as to First City - National, and ordered the Plaintiff to file an Amended Complaint (A-3) within ten days. The Clerk of the Court sent the case file to the Houston District Court on the very day of the Court's Order, April 11, 1990. The Plaintiff filed an Amended Complaint within the time set by the Court Order of April 11, 1990. The Plaintiff's Amended Complaint was not accepted by the Clerk of the District Court, Tampa Division, and was returned by the Clerk of the Court to the Plaintiff. The Plaintiff's Amended Complaint was sent to the Clerk of Houston District Court and was not accepted by the Court and was returned by the Clerk of the Houston District Court to the Plaintiff. On June 8, 1990, the Plaintiff filed a Motion for the Return of the Case File to Florida (R-44) wherein the Plaintiff advised the Court that the

Amended Complaint was Ordered to be filed by the Judge of the Tampa District Court, that the Amended Complaint was filed by the Plaintiff in a timely manner, and that the Plaintiff's Amended Complaint was not accepted nor entered on the docket of the Tampa District Court, nor was the Plaintiff's Amended Complaint accepted or docketed in the Houston District Court. The Fifth Circuit Court of Appeals erred when the Court denied the Plaintiff his right to appeal an Order of the District Court Houston, that therein dismissed the case for failure to state a claim when the Court would not accept the Plaintiff's Amended Complaint and therefore had no basis for judging whether the Amended Complaint did or did not state a claim. The Plaintiff was denied his Fourteenth Amendment right to Due Process of Law when the court would not accept his Amended Complaint and further, the Plaintiff was denied his Fourteenth Amendment right to Equal Protection of the Laws when the Court dismissed the case for failure to state a claim without a reivew of the Plaintiff's Amended Complaint. The Fifth Circuit Court of Appeals should have protected the Constitutional Rights of the Plaintiff and reversed the Order of the District Court.

III

A. On April 11, 1990, the United States District Court, Tampa Division, Ordered that the case be sent to the Houston District Court, that the case is dismissed as to First City National and that the Plaintiff file an Amended Complaint within ten (10) days. The Plaintiff filed a Motion for Reconsideration of the Court's Order of April 11, 1990. The Post Trial Motion was filed in a timely manner on Monday, April 23, 1990. The Court returned the Plaintiff's Motion for Reconsideration of the Court's Order of April 11, 1990 with a notation that "this should be sent to Texas." The Fifth Circuit Court of Appeals erred when the Brief of the Appellant showed the Court that the Order of the District Court, Houston was moot as the Post Trial Motion of the Plaintiff, to the Order of the Tampa District Court, April 11, 1990, wherein the case was Ordered sent to the Houston District Court was not ruled on by the Tampa District Court. As evidence thereof, Plaintiff submitted to the Court of Appeals documents that showed: 1) The Plaintiff's Motion for Reconsideration was not accepted and was returned to the Plaintiff by the Clerk of the Tampa District Court; 2) No Motion for Reconsideration of the Plaintiff was entered on the docket of the Tampa District Court; 3) No Order of the Court dismissing the Plaintiff's Motion for Reconsideration was entered on the docket of the Tampa District Court; 4) The case file was sent to the Houston District Court on the same date, April 11, 1990, that the Court Ordered the case be sent to Houston, therefore the Court would not have a case file to review before entering a final Order of dismissal; 5) The Motion

for Reconsideration of the Court Order of April 11, 1990, that the Plaintiff filed in the Office of the Clerk of the Tampa Court and had returned to him, by the Clerk of the Court, was a document containing sixty-five (65) pages. The document presently in the case file in the Houston District Court contains only eight (8) pages.

B. The denial of the appeal of Cortez by the Fifth Circuit Court of Appeals without the consideration of the evidence and facts contained in the Brief for Appellant that show the District Court, Tampa Division did not rule on Plaintiff's Motion for Reconsideration of the Court Order of April 11, 1990, denying the Appellant Due Process of Law under the Fourteenth Amendment, and the Court's failure to consider the facts and evidence presented to the Court in the Brief of Appellant that records had been tampered with and that false documents had been placed into the case file, did deny the Appellant his Fourteenth Amendment right to Equal Protect of the Laws.

IV

A. The Fifth Circuit Court of Appeals was in opposition to the mandates of the Circuit Court when the Court failed to vacate the permanent injunction issued by the Houston District Court against the Plaintiff. Enterprise International Inc. v. Corporacion Estatol Petro ERA Ecuatoriana et al., 762 FD 2nd 464 Fifth Circuit (A-23). When it was shown to the Court that the Movant failed to show: 1) a substantial likelihood of success on the merits; 2) a substantial threat of irreparable injury if it is not issued; 3) that the threatened injury to the Movant outweighs any damage this injunction might cause to the opponent, and 4) that the injunction will not disserve the public interest. Further, the permanent injunction is so unlimited and unspecific that the injunction violates the First Amendment right to Petition the Goivernment for regress.

B. The failure of the Court of Appeals to follow the mandates of the Circuit, supra, and vacate the permanent injunction did deny the Appellant equal protection of the laws under the Fourteenth Amendment, and further the Court's failure to vacate an injunction that is unlimited and unspecific violates the right of the Plaintiff and unnamed parties to petition the Government for redress under the First Amendment.

WHY WRIT SHOULD ISSUE

The encroachment of an agency of the executive branch of the United States Government into the Judicial Branch of the United States Government is violative of the first, second and third articles of the Constitution of the United States whereunder the legislative power is vested in the Congress, the executive power is vested in the President and the judicial power is vested in the Supreme Court and all inferior courts as established by Congress. The issue of writ of certiorari will produce evidence, to this court that, the Federal Deposit Insurance Corporation did encroach into the judicial processes of two United States District Courts and two United States Courts of Appeals. The evidence produced thereunder will further show the court that a continuation of this intrusion, by the executive branch into the decision-making processes of the lower courts does, and will have, a profound and nullifying effect on the Constitutional right to, due process of law and equal protection of the laws of all litigants, past, present and future, who sought or may seek legal redress against this agency (FDIC) of the executive branch of our government.

CONCLUSION

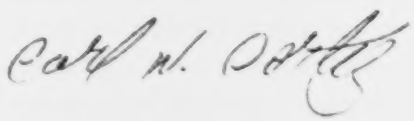
The Petition for a Writ of Certiorari should be granted by the Court as a search of the records will show evidence to the Court that a Branch of the United States Government and others did commit three (3) separate acts of perjury in a United States District Court, that a Branch of the United States Government and others did commit in excess of twenty-five (25) separate acts of fraud upon the Court, in two (2) United States District Courts and two (2) United States Court of Appeals, that a Branch of the United States Government and others did use their power and influence to have Federal Court records altered, tampered with, and removed from the files of the Clerk's Office in two (2) United States District Courts, that two (2) United States Court of Appeals have ruled in opposition to the mandates of the Circuit and that two United States Court of Appeals have issued rulings in opposition to the mandates of the Supreme Court of the United States.

A search of the case file will further show the Court a pattern of deceit and chicanery that a Branch of the United States Government and others used to bias each of the Courts that this case has appeared to make the Courts believe that the Plaintiff was harassing the Defendants and that the Plaintiff's case was frivolous. The seeking of justice, no matter how many years it may take, is not harassment nor is the presentation of evidence of criminal acts and fraudulent acts perpetrated by the Defendants upon the Court frivolous. Furthermore, the Motion for Reconsideration to the Court Order of April 11,

1990, that the District Court Tampa would not accept and did not rule on, did show the Court that the criminal acts of perjury, 18 USCS 1621 and removal of records, 18 USCS 2071 (A-6) and (A-19) had been committed upon the Court, and therefore the District Court did have venue, "28 USCS 1931" under the Long Arm Statutes of the State of Florida (48-193) and further, that the Court did have jurisdiction under 28 USCS 60(B), Hazel Atlas Glass Co. v. Hartford Empire, 332, U.S. 238, (A-30). The judgment against the Plaintiff and others as ordered by the United States District Court Houston, must be reversed, United States v. Throckmorton, 98 U.S. 93 (A-26). Furthermore, tampering with the administration of justice in the manner indisputedly shown here involves more than an injury to a single litigant, it is a wrong against the institutions set up to protect and safeguard the public institutions in which fraud cannot be complacently tolerated consistently with the good order of society. Surely it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of the litigants. The public welfare demands that the agencies of public justice be not so impotent that they must be mute and helpless victims of deceptions and fraud, Hazel Atlas Glass, supra.

Therefore, it is respectfully requested that the dismissal of the party appeal by the Fifth Circuit Court of Appeals be reversed; that the case be remanded to the venue of the United States District Court, Tampa Division with instructions from this Court that the injustice done to the Petitioner, Cortez, be corrected by that Court, or in the alternative, under the power and the authority of this Court that the case be finally and justly adjudicated.

Respectfuly submitted,



Carl W. Cortez, pro se
801 Main #42
Dunedin, Florida 34698
(813) 738-8125

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2812

CARL W. CORTEZ,
Plaintiff-Appellant,
versus
FIRST CITY NATIONAL BANK, ET AL.,
Defendants-Appellees.

U.S. Court of APPEALS
FILED
DEC. 2, 1991
GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court for the Southern District of Texas

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for reconsideration of the Court's order of October 30, 1991, dismissing the appeal is denied.

11/26/91

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2812

CARL W. CORTEZ,
Plaintiff-Appellant,
versus
FIRST CITY NATIONAL BANK, ET AL.,
Defendants-Appellees.

U.S. COURT OF APPEALS
FILED
OCT. 30, 1991
GILBERT F. GANUCHEAU
CLERK

Appeal from the United States District Court for the Southern District of Texas

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of the appellee FDIC to dismiss the appeal is granted.

10/24/91

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL W. CORTEZ	)	
VS.	)	CIVIL ACTION
FIRST CITY NATIONAL BANK OF HOUSTON, ET AL.	)	NO. H-90-1318

ORDER

Came on for consideration on the date set forth below the Petition for Rehearing of Carl W. Cortez. The Court is of the opinion that the Petition for Rehearing of Carl W. Cortez should be denied.

Accordingly, it is so ORDERED.

SIGNED at Houston, Texas, this 17th day of May, 1991.

Chief Judge
United States District Court

APPROVED AS TO FORM:
Mark C. Guthrie
State Bar No. 0863660

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAY 20, 1991
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL W. CORTEZ,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	NO. H-90-1318
FIRST CITY NATIONAL BANK,	)	
Defendant.	)	

FINAL ORDER OF DISMISSAL AND INJUNCTION

In accordance with the memorandum opinion signed this day, it is hereby

ORDERED

that defendants' motion to dismiss is GRANTED, and this case is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff, and/or anyone acting on his behalf, is hereby ENJOINED from filing any action against any defendant or agent, successor or attorney of any defendant which relates, in whole or in part, directly or indirectly, to the subject matter of this lawsuit unless and until (1) the sanctions imposed against plaintiff in Civil Action No. H-85-5987 have been paid and (2) plaintiff has obtained prior leave of court. Nothing in this order is to be construed as preventing plaintiff from appealing this final order to the United States Court of Appeals subject to all applicable rules.

Plaintiff is advised that failure to comply with the terms of this injunction may result in a finding of contempt of court and appropriate sanctions.

THIS IS A FINAL ORDER.

Signed this 4th day of April, 1991.

Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 08 1991
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL W. CORTEZ, Plaintiff,	)	
v.	)	CIVIL ACTION
FIRST CITY NATIONAL BANK, et al.,	)	NO. H-90-1318
Defendants.	)	

MEMORANDUM OPINION

This case is before the Court on defendants' motion to dismiss and for sanctions. Plaintiff has been given an opportunity to respond to the motion both in writing and at a hearing in open court. The motion is ripe for decision, and should be granted.

In 1985, plaintiff and others filed an action in this district against a number of banks alleging fraud, constructive fraud, breach of warranty, violations of the Texas Deceptive Trade Practices Act, violations of the Racketeer Influenced and Corrupt Organizations Act, violations of the Federal Electronic Funds Transfer Act, conversion, and negligence relating to the banks' respective banking practices. That case, Civil Action No. H-85-5987, was dismissed with prejudice in 1987. The judge in his dismissal order indicated that the plaintiff exhibited "among the worst examples of bad faith in litigation that this Court has seen." The judge in H-85-5987 also imposed sanctions against plaintiff, ordering him to pay attorneys' fees and costs of court. These sanctions have not been paid.

A plaintiff who is dissatisfied with a judgment of a federal district court may challenge that judgment in a number of ways. Initially, the plaintiff may ask the district judge who entered the judgment to reconsider. Fed. R. Civ. P. 59(e). Cortez filed a motion for reconsideration, raising as a basis for his motion allegations that the defendants had perpetrated a fraud on the court. The motion for reconsideration was denied.

A dissatisfied plaintiff may also appeal the district court judgment to the United States Court of Appeals. Cortez attempted to appeal the judgment in H-85-5987 to the Fifth Circuit in forma pauperis, but leave to appeal without paying the docketing fee was denied. Plaintiff did not pay the appropriate fee, and the appeal was dismissed. Plaintiff petitioned the United States Supreme Court for a Writ of Certiorari, which was denied.

Rule 60(b) of the Federal Rules of Civil Procedure provides that a party may seek relief from a judgment for certain reasons, including fraud or other misconduct of an adverse party. This motion, however, must be made within

one year from the entry of the challenged judgment. Cortez failed to file a Rule 60(b) motion for relief from judgment within one year as required by the rule.

Instead, in January 1990, Cortez filed a "Complaint of Independent Action for Relief from Judgment on Grounds of Fraud" in the United States District Court for the Middle District of Florida at Tampa, which was transferred to this Court as case H-90-1318. Because of the need to ensure finality of judgments and an end to litigation, several essential elements must be met before an independent action can be used to challenge a prior judgment. These include a finding that (1) equity and good conscience preclude enforcement of the prior judgment; (2) there exists a good defense to the cause of action upon which the judgment is founded; (3) fraud, accident or mistake prevented the defense from being asserted; (4) the party challenging the judgment is free from fault or neglect; and (5) there is no adequate remedy at law. Bankers Mortgage Co. v. United States, 423 F.2d 73, 79 (5th Cir.), cert. denied 399 U.S. 927 (1970). Cortez has failed to meet these requirements. The judgment challenged by Cortez was entered as a sanction for filing frivolous litigation in a case described as the court as "one of the worst examples of bad faith in litigation that this Court has seen." The allegations made by Cortez do not show that the judgment should not be enforced, that there exists a good defense to the sanctions which he was prevented from asserting because of fraud, or that he is free from fault or neglect. As a result, plaintiff's attempt to obtain relief from the judgment in H-85-5987 be independent action must fail and the action must be dismissed.

While the Court is confident that plaintiff is sincere in his belief that the prior judgment is unjust, the allegations made by plaintiff and the applicable law do not allow the relief plaintiff seeks. The claims made by Cortez in this lawsuit are not supported by existing law or any reasonable argument to change existing law. Consequently, the claims, while perhaps sincere, are frivolous. The monetary sanctions imposed by the court in H-85-5987 have proved unsuccessful in deterring Cortez from filing such litigation. Not only has Cortez failed to pay the amount imposed, he has continued to file meritless lawsuits against these defendants. Additionally, Cortez has stated that he is unable to pay any monetary sanction because he has only part-time employment. Where, as here, monetary sanctions are ineffective, the Court may enjoin plaintiff from filing abusive litigation. Farguson v. MBank Houston, N.A., 808 F.2d 358, 360 (5th Cir. 1986); Day v. Allstate Insurance Co., 788 F.2d 1110 (5th Cir. 1986). See also In re Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984). The Court finds that an injunction precluding Cortez from filing any similar litigation against these defendants, their agents, successors or attorneys until he has paid the prior sanctions and has obtained leave of court is both appropriate and necessary in this case. Therefore, an

order enjoining plaintiff to this extent will be entered this day. Plaintiff is advised that violation of the injunction may result in the imposition of sanctions more severe than monetary sanctions.

SIGNED this 4th day of April, 1991.

Chief Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED APR 08 1991
Jesse E. Clark, Clerk

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§ 1823. Corporation monies

(E) the term "acquire" means to acquire, directly or indirectly, ownership or control through--

(i) an acquisition of shares;

(ii) an acquisition of assets or assumption of liabilities;

(iii) a merger or consolidation; or

(iv) any similar transaction;

(F) the term "affiliated insured bank" means--

(i) when used in connection with a reference to a holding company, an insured bank which is a subsidiary of such holding company; and

(ii) when used in connection with a reference to 2 or more insured banks, insured banks which are subsidiaries of the same holding company; and

(G) the term "subsidiary" has the meaning given to such term in section 2(d) of the Bank Holding Company Act of 1956 [12 USCS § 1841(d)].

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§ 1621. Perjury generally

Whoever--

(a) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 USCS § 1746], willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Carl W. Cortez
Plaintiff

vs.

First City National Bank of Houston, Federal Deposit Insurance Corporation, First City Texas, Houston, successors of interest

M Bank Houston, Federal Deposit Insurance Corporation, Bank One Texas, successors of interest

Village National Bank, M. Bank Memorial, Federal Deposit Insurance Corporation, Bank One Texas successors of interest

Peoples Bank, NBC Spring Branch, Federal Deposit Insurance Corporation, NBC Houston, Equimark, successors of interest

Petrobank, Federal Deposit Insurance Corporation, successors of interest

Defendants

Case No.
90-12-CIV-T-17-B

AMENDED COMPLAINT OF
INDEPENDENT ACTIONS FOR
RELIEF FROM JUDGEMENT ON
GROUNDS OF FRAUD - COMPLAINT

Plaintiff, Carl W. Cortez, pro se, complains of the above captioned Defendants and respectfully shows to the Court:

1. Plaintiff is an individual residing in the City of Dunedin, Florida. Plaintiff is employed in the City of Dunedin, Florida, and is a citizen of the State of Florida as defined by 28 USC § 1391(e), (e4).

2. The jurisdiction of this Court is invoked pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, 28 USC § 1332 and 28 USC § 1349.

3. The Federal Deposit Insurance Corporation is an independent agency within the Executive Branch of the United States Government. The FDIC does maintain an office in the State of Florida and the FDIC does employ people in the State of Florida. The FDIC is a citizen of the State of Florida for service of process.

4. The Federal Deposit Insurance Corporation is a successor of interest from the titled, original parties of interest.

5. ON OCTOBER 18, 1985, the Plaintiff and others filed a complaint against the above captioned Defendants, being civil actions No. 85-5987 in the United States District Court, Southern District of Texas, Houston, Texas, by which suit Plaintiff sought to recover actual and individual dangers caused by:

a. The fraud, theft and conversion of corporate Plaintiff's funds in excess of $148,000.00

b. By the violation of the corporate Plaintiff's depositor agreement by the respective bank

c. By the unauthorized banking activities by its respective banks with regard to the corporate Plaintiff's checking accounts

d. By the respective bank's violation of commercially reasonable banking practices and applicable banking regulations

e. By conversions by the respective banks

f. By breach of warranties by respective banks

g. By the violations by the respective banks of Rico laws, 18 USC § 1964 of 15 USC § 1693M and section 17.41 et seq., Texas Business and Commercial Code

h. By the fraud of the respective banks by virtue of their failure to disclose material facts to their fiduciary, and

i. By the bank constructive fraud

The original cause also sought for punitive damages "allowed by the facts proved and applicable law."

6. The complaint filed on October 10, 1985, in the United States District Court, of Texas, Houston Division, was dismissed with prejudice on October 5, 1987, with a judgement of $46,362.00 in favor of the Defendants. The Plaintiff's defeat in the original cause, in Houston, Texas, was brought about

by the deliberate and purposeful misconduct of the Defendants. Defendants entered into a collusion with Plaintiff's former attorney to subvert the fact finding process by defeating full presentation of the Plaintiff's case. Through acts of fraud upon that Court, that made it appear to the Court that Plaintiff had hampered the discovery process. The misconduct of the Defendants and the resulting damage to the Plaintiff should be addressed and set right under the unlimited power, granted the Court by Federal Rules of Civil Procedure 60(b).

7

a. On April 16, 1987, Defendant First City Bank fraudulently solicited information from Plaintiff's former attorney as to how Plaintiff's expert witness would testify.

b. On April 16, 1987, Defendant First City Bank fraudulently received from Plaintiff's former attorney information as to how Plaintiff's expert witness would testify.

c. Defendant First City Bank used the information they had received from Plaintiff's former attorney as to how Plaintiff's expert witness would testify as a part of their defense in motions filed with the Court on June 25, 1987, and October 9, 1987, to prejudice the Court against the Plaintiff and to bring about the Plaintiff's defeat.

d. On or about June 22, 1987, Defendant First City Bank fraudulently solicited copies of privileged correspondence from Plaintiff's former attorney, said copies of correspondence being letters written by Plaintiff's former attorney to the Plaintiff.

e. On or about June 22, 1987, Defendant First City Bank fraudulently received copies of privileged correspondence from Plaintiff's former attorney, said copies being letters written by Plaintiff's former attorney to the Plaintiff.

f. Defendant First City Bank used the information contained in the copies of privileged correspondence they had received from Plaintiff's former attorney as part of their defense in motions filed with the Court on June 25, 1987, and October 9, 1987, to prejudice the Court against the Plaintiff and to bring about the Plaintiff's defeat.

g. Defendant First City Bank made false statements in their motions filed with the Court on June 25, 1987, and October 9, 1987, wherein Defendant falsely stated Plaintiff had a long history of discovery abuse. Defendant First City Bank's false statements to the Court were for the improper purpose of further prejudicing the Court against the Plaintiff.

h. The misconduct of Defendant First City Bank (6A through 6F) did deceive the Court and resulted in the dismissal of Plaintiff's case and an award of judgement to the Defendant.

8

a. On April 16, 1987, Defendant Village National Bank fraudulently solicited information from Plaintiff's former attorney as to how Plaintiff's expert witness would testify.

b. On April 16, 1987, Defendant Village National Bank fraudulently received, from Plaintiff's former attorney, information as to how Plaintiff's expert witness would testify.

c. Defendant Village National Bank used the information they had received from Plaintiff's former attorney as to how Plaintiff's expert witness would testify as part of their defense in their motions and brief filed with the Court on July 9, 1987.

d. On or about June 23, 1987, Defendant Village National Bank fraudulently solicited copies of privileged correspondence from Plaintiff's former attorney, said copies of correspondence being letters written by Plaintiff's former attorney to the Plaintiff.

e. On or about June 22, 1987, Defendant Village National Bank fraudulently received copies of privileged correspondence from Plaintiff's former attorney, said copies of correspondence being letters written by Plaintiff's former attorney to the Plaintiff.

f. Defendant Village National Bank used the information contained in the copies of privileged correspondence they had received from Plaintiff's former attorney as part of their defense in a motion and brief filed with the Court on July 9, 1987.

g. Defendant Village National Bank made false statements in their motion filed on July 9, 1987, wherein Defendant falsely stated that the corporate officers of Speedy Products, Inc. determined to discharge their attorney on April 15, 1987. The Defendant also made false statements to the Court in his brief filed April 15, 1987, wherein Defendant falsely stated Plaintiff has taken no action for more than one year and three months, for the improper purpose of further prejudicing the Court against the Plaintiff.

h. The misconduct of Defendant Village National Bank (6A through 6F) did deceive the Court and resulted in the dismissal of Plaintiff's case and an award of judgement to the Defendants.

9

a. On April 16, 1987, Defendant M Bank Houston fraudulently solicited information from Plaintiff's former attorney as to how Plaintiff's expert witness would testify.

b. On April 16, 1987, Defendant M Bank Houston fraudulently received from Plaintiff's former attorney information as to how Plaintiff's expert witness would testify.

c. Defendant M Bank Houston used the information they had received

from Plaintiff's former attorney as to how Plaintiff's expert witness would testify as part of their defense in motions filed with the Court June 25, 1987, and October 9, 1987, to prejudice the Court against the Plaintiff and to bring about the Plaintiff's defeat.

d. On or about June 22, 1987, Defendant M Bank Houston solicited copies of privileged correspondence from Plalintiff's former attorney, said copies of correspondence being letter written by Plaintiff's former attorney to the Plaintiff.

e. On or about June 22, 1987, Defendant M Bank Houston fraudulently received copies of privileged correspondence from Plaintiff's former attorney, said copies being letters written by Plaintiff's former attorney to the Plaintiff.

f. Defendant M Bank Houston used the information contained in the copies of privileged correspondence they had received from Plaintiff's former attorney as part of their defense in motions filed with the Court on June 25, 1987, and October 9, 1987, to prejudice the Court against the Plaintiff and to bring about the Plaintiff's defeat.

g. Defendant M Bank Houston made false statements in their motions filed with the Court on June 25, 1987, and October 9, 1987, wherein Defendant falsely stated Plaintiff had a long history of discovery abuse. Defendant M Bank Houston's false statements to the Court were for the improper purpose of further prejudicing the Court against the Plaintiff.

h. The misconduct of Defendant M Bank Houston did deceive the Court and resulted in the dismissal of Plaintiff's case and an award of judgement to the Defendant.

10

a. On April 16, 1987 Defendant Peoples Bank fraudulently solicited information from Plaintiff's former attorney as to how Plaintiff's expert witness would testify.

b. On April 16, 1987 Defendant Peoples Bank fraudulently received from Plaintiff's former attorney information as to how Plaintiff's expert witness would testify.

c. Defendant Peoples Bank used the information they had received from Plaintiff's former attorney as to how Plaintiff's expert witness would testify, as part of their defense in motion filed with the court on June 30, 1987 to prejudice the court against the Plaintiff and to bring about the Plaintiff's defeat.

d. On or about June 27, 1987 Defendant Peoples Bank fraudulently solicited copies of privileged correspondence from Plaintiff's former attorney, said copies being letters written by Plaintiff's former attorney to Plaintiff.

e. On or about June 22, 1987 Defendant Peoples Bank fraudulently

received copies of privileged correspondence from Plaintiff's former attorney said copies being letters written by Plaintiff's former attorney to the Plaintiff.

f. Defendant Peoples Bank used this information contained in the copies of privileged correspondence, they had received from Plaintiff's former attorney as part of their defense in motion filed with the court on June 30, 1987, to prejudice the court against the Plaintiff and to bring about the Plaintiff's defeat.

g. Defendant Peoples Bank made false statements in their motion filed with the court on June 30, 1987 wherein the Defendant falsely stated that Plaintiff refused and failed to produce their expert witness, Defendant also falsely stated in said motion that Plaintiff had discharged his attorney on April 15, 1987. The false statements of Defendant Peoples Bank were for the improper purpose to further prejudice the court against the Plaintiff.

h. The misconduct of Defendant Peoples Bank did deceive the court and resulted in the dismissal of Plaintiff's case and an award of judgment to the Defendant.

i. On April 16, 1987 Defendant Peoples Bank submitted, with their motion to dismiss, three false documents consisting of signature card and corporate documents that did mislead the court, into believing Defendant had the proper corporate document, on file, at the time Plaintiff had on account at Peoples Bank, and Defendants did submit, said three fraudulent documents as evidence that Defendant Peoples Bank did, in fact, have such records on file, to deceive the court and to fraudulently deny the Plaintiff the right to be heard by the court.

11

a. On April 16, 1987 the successor of interest to Defendant Petro Bank, Federal Deposit Insurance Corporation fraudulently solicited information from Plaintiff's former attorney as to how Plaintiff's expert witness would testify.

b. On April 16, 1987 the Federal Deposit Insurance Corporation, successor of interest to Defendant Petro Bank, fraudulently received from Plaintiff's former attorney, information as to how Plaintiff's expert witness would testify.

c. The Federal Deposit Insurance Corporation's successor of interest to Defendant Petro Bank used the information they had received form Plaintiff's former attorney, as to how Plaintiff's expert witness would testify, as part of their defense in motion field with the Court on June 29, 1987 to prejudice the Court against the Plaintiff and to bring about the Plaintiff's defeat.

d. On or about June 22, 1987 the Federal Deposit Insurance Corporation's successor of interest to Defendant Petro Bank solicited copies of privileged correspondence from Plaintiff's former attorney, said copies of correspondence being letters written by Plaintiff's former attorney to the Plaintiffs.

e. On or about June 22, 1987 the Federal Deposit Insurance Corporation, successor of interest to Defendant Petro Bank fraudulently received from Plaintiff's former attorney copies of privileged correspondence, said copies being letters written by Plaintiff's former attorney, to the Plaintiffs.

f. The Federal Deposit Insurance Corporation's successor of interest to Defendant Petro Bank, used the information contained in the copies of privileged correspondence they had received from Plaintiff in motion filed with the court on June 29, 1987, to prejudice the court against the Plaintiff and to bring about the Plaintiff's defeat.

g. The Federal Deposit Insurance Corporation's successor of interest to Defendant Petro Bank made false statements in their motions filed with the court on June 29, 1987 wherein the F.D.I.C. falsely stated that Plaintiff had authorized another party to sign a corporate account card, at Petro Bank and that Plaintiff had authorized said party to sign and endorse checks on behalf of the corporate Plaintiff. The F.D.I.C. false statements to the court were for the improper purpose of further prejudicing the court against the Plaintiff.

h. On June 29, 1987, the Federal Deposit Corporation's successor of interest to Defendant Petro Bank submitted with their Amended Motion to Dismiss and for sanctions a false document, consisting of a signature card, whereas the FDIC mislead the court that said document was a true and correct copy of the signature card authorizing the opening of an account in Plaintiff's corporate name, and to mislead the court that Plaintiff had authorized another party to sign and endorse checks. The FDIC submitted said false documents to deceive the court and to deny the Plaintiff the right to be heard by the court.

i. The misconduct of the Federal Deposit Insurance Corporation's successor of interst to Petro Bank did deceive the court and resulted in the dismissal of Plaintiff's case and an award of judgment to the Defendant.

12

The foregoing facts describe, but are not limited to, the misconduct of the Corporate Defendants and the effect this misconduct had on the outcome of the Plaintiff's case in the United States District Court, Houston, Texas. The foregoing facts do not describe the loss that was suffered by the Plaintiff and others for all the aforementioned acts of fraud upon the court and under the unlimited power granted the court under the saving provisions of Federal Rules of Civil Procedure 60(b) Plaintiff proves:

a. The judgment of the United States District Court Houston, Texas be set aside.

b. The Plaintiff's actual loss of $184,000.00 be awarded to the Plaintiff.

c. For the loss of money, saleable property, depravation and injury

suffered by the Plaintiff, as calculated from a prospectus, offered investors in 1985, which shows the projected growth potential expected from Plaintiff's companies, that pecuniary damages of $31,560,000.00 be awarded to the Plaintiff.

d. As required by Statute, Rico Act, 18 USC § 1964 triple the amount of actual and pecuniary damages be awarded to the Plaintiff.

e. To punish the Defendants and to set an example to similar wrong-doers to show, the court will not permit fraudulent acts to subvert the court's administrations of justice and for the mental anguish and degradations suffered by the Plaintiffs by the evil behavior of the Defendant that the Plaintiffs be awarded exemplary damages, four times the amount of actual and pecuinary damages.

Respectfully submitted,

Carl W. Cortez
Pro Se
140 Highland Avenue
Dunedin, Florida 34698
(713) 733-3849

the Cortez Group

div Speedy Products Inc

PROSPECTUS
A Private Offering
An Investment Opportunity

Speedy Products Inc. is a company that has recorded sales increases every year that it has been in business, even during the recession of 1981-1982. The continued growth of the company has been due to the dedication of the principles and the ability to bring to the marketplace a combination of program, packaging, and product that is second to none.

Speedy Products Inc. is now making available to select individuals, preferred stock in the corporation. The proceeds from the sale of the stock will be used to expand the product line and the market currently being pursued. (See following pages)

The prefered stock will be available in minimum lots of $5000.00. The price of the stock is $1.00 a share.

The Corporation will issue a Call Factor Agreement to buy back all shares in not more than five years after the issuance. The agreement will allow the holder of the stock to sell it back at anytime after the second year. The price of the stock after two years will be $3.00 a share. The third year the price will be $4.00 a share. The fourth year, $5.00 a share, and the fifth year all remaining stock will be purchased at $6.00 a share. Under this agreement, $10,000.00 worth of Speedy Products Inc. prefered stock would be worth $60,000. at the end of five years.

This offering is private and will be limited to thirty-five (35) investors.

FIRST YEAR PROJECTIONS;

Guns and Irons;	Avg. Price	Projected Units	1st Year Sales
Automotive;	$11.50	51,840	$596,160.00
Electronic;	$11.50	38,880	$447,120.00
Sieze-its;			
Electronic;	$5.95	20,000	$119,000.00
Fisherman's Friend			
Sporting;	$6.95	35,000	$243,250.00
			$1,405,530.00
	2nd year @ 25% growth		$1,756,875.00
	3rd year @ 15% growth		$2,020,406.00
	4th year @ 15% "		$2,323,466.00
	5th year @ 15% "		$2,671,985.00
TOTAL PROJECTED SALES FOR FIVE YEARS			$10,178,262.00

Basis for sales projections;

Guns and Irons - An automotive warehouse distributor will give you an average of 120 jobbers (he sells to), each jobber should sell a minimum of 5 units/month or 60 units/yr. 72 accounts will thus yield 60x120 or 7200 units per warehouse. Times 72 accounts = 51,840 units x $11.50 = $596,160. Based on 15 years of selling soldering guns and other tools to the automotive and electronics industry, I believe the minimum number of units of guns and irons an electronic distributor will sell is 36/month or 432/year. 432 units times 90 accounts = 38,880 units x $11.50 = $447,120. Hardware and Houseware chains such as Whites, T G & Y, OTASCO, WALMART, etc. would give you a market far inexcess of the automotive and electronic distributors. We feel we will sell at least two or more of this type of account but to keep projections conservative, no figures are shown for major outlets.

Sieze-Its - We have already been selling this product for 2 years to the Electronic distributors and have sold 120 accounts. With the addition of soldering guns and irons, we realistically feel our sales will greatly increase. (20,000 units x $5.95 = $119,000)

Fisherman's Friend - There are a couple of competitors on this item selling a cheap product with poor packaging and no program. We will sell the products beautifully skin-carded at $6.95 and will include a free 4 in. pocket knife and sheath. The total retail cost if bought separately is $28.95; we believe it will retail for around $10.95. Also, our products are of high quality. This item will sell to sporting goods chains, drug chains, anyone with a sporting goods department. We have had experience selling to this market also. First year projections are a conservative 35,000 units times $6.95 = $243,250.

CORPORATE STRUCTURE
SPEEDY PRODUCTS INC.
Incorporated March 1, 1981

Division I . . . C.W. CORTEZ COMPANY
Established in Texas 1967

C.W. CORTEZ COMPANY is a Manufacturer's Representative Agency, representing manufacturers of automotive and electronic parts. Earnings are based on commissions paid by the manufacturers for sales and shipments to all customers in Texas, Okalahoma, Arkansas, and Louisiana.

In the eighteen years of doing business in the southwest, C.W. Cortez Company has sold in excess of $48,000,000.

In 1981, when Speedy Products Inc was founded as the parent corporation C.W. Cortez Co. took over the function of sales on a national level, and the solicitation of other manufacturers to represent were restricted to four.

Division II. . . Autotex Division
Established 1981

Autotex is the trade name for our repackaged line of carburetor preheater duct and automotive fresh air duct. We are selling Autotex to 38 warehouse distributors from coast to coast. We have also been approved as the sole supplier for Automotive Aftermarket Distributors Inc, a group of 52 warehouses across the United States. We are presently selling an average of three new warehouse distributors a month.

Division III. . . The Cortez Group
Established 1982

The Cortez Group division is presently importing and packaging tools for resale to the electronics wholesale distributors. Our first product, Seize-Its has been successfully sold to 120 electronic distributors across the country. Since March of 1983, approximately 20,000 units have beens sold and sales are expected to double as new items are added.

Carl W. Cortez Sr. President-Speedy Products D.O.B. 12/19/30
1107-D Upland
Houston, Texas 77043
(713) 461-9295 Divorced
S.S.# 385-26-9309

Earned High School diploma through G.E.D.
Attended Los Angeles City College for two years. Psycology major.

First sales job was with Atlantic Richfield in Los Angeles.

Several years later went to work for A.E. Rodman Co. as a Manufacturers Agent. Held this position for several years.

In 1964 went to work for Walter Loveblad Co. Manufacturers Agents. After a year he was made a full partner in the company.

In 1967 he decided to start his own agency and decided the Southwest was the ideal place. In May of 1967 the family moved to Arlington, Tx. C.W. Cortez Co. was begun and is still in existence today.

Mr. Cortez's interests are reading, traveling, and business in general.

Carl W. Cortez Jr. Vice-Pres. D.O.B. 12/12/52
3243 Windmore
Katy, Texas 77449
(713) 579-1091 Single
S.S.# 429-96-7171

Graduated Arlington High School in 1971. General courses.

Attended University of Texas at Arlington for two years as a Journalism major.

From 1972-1974 I worked a series of jobs such as Bartender, Waiter, Advertising salesman.

In Sept. 1974 I went to work for C.W. Cortez Co. as a salesman covering the Louisiana territory. I am now Vice-President of Speedy Products Inc.

My interests are reading, collecting books, the Martial Arts, and movies.

SPEEDY PRODUCTS INC
BALANCE SHEET
PERIOD ENDING 09/30/84

ASSETS

CURRENT ASSETS		
Cash - Western	2,428.11	
Cash - Petrobank	100.57	
Accounts Receivable	16,662.49	
Commissions	3,700.00	
Inventory - Materials	42,612.56	
Inventory - Shipping	2,350.00	
Inventory - Packaging	14,400.00	
Advance - Royce	12,094.56	
Subs - Rec.	353.00	
TOTAL CURRENT ASSETS		99,701.22
FIXED ASSETS		
Auto & Truck	34,838.30	
Office Furniture	4,838.30	
Accum Depr	-3,806.06	
TOTAL FIXED ASSETS		35,870.54
TOTAL ASSETS		130,571.76

§ 2071. Concealment, removal, or mutilation generally

(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

Rule 60. Relief from Judgment or Order

(a) **Clerical Mistakes**. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

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§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of

citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought--

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is

licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

CIVIL PRACTICE AND PROCEDURE

§ 48.193. Acts subjecting person to jurisdiction of courts of state

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative tothe jurisdiction of the courts of this state for any cause of action arising from the doing of any of the folowing acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a torturous act within this state.

(c) Owning, using or possessing any real property within this state.

(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

ENTERPRISE INTERNATIONAL, INC.,
Plaintiff-Appellee,
v.
CORPORACION ESTATAL PETROLERA ECUATORIANA, et al.,
Defendants-Appellants.
No. 84-2424.
United States Court of Appeals,
Fifth Circuit.
June 10, 1985.
Rehearing Denied July 8, 1985.

Party that obtained international guarantee for benefit of Ecuadorian official state-operated oil company to secure performance of contract for sale of gas to that company filed suit in Texas state court seeking temporary restraining order prohibiting, inter alia, oil company from drawing on the guarantee or a standby letter of credit. Following removal, the United States District Court for the Southern District of Texas, at Houston, Robert O'Conor, J., issued a preliminary injunction, and oil company appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) District Court should not have issued preliminary injunction without determining whether it had jurisdiction over the party enjoined; (2) party that obtained the letter of guarantee failed to show substantial threat of irreparable harm in absence of preliminary injunctive relief enjoining oil company from drawing on the letter; (3) District Court properly ordered further discovery to enable essential jurisdictional facts to be determined; and (4) the injunction impermissibly interfered with the parties' contractual arrangement, requiring remand for vacating of the injunction and giving parties time to exercise contractual rights under the standby letter of credit and guarantee.

Vacated and remanded.

1. Injunction ⇐ 110, 115

Because the rule relating to injunctions confers no jurisdiction, district court must have both subject matter jurisdiction and in personam jurisdiction over the party against whom the injunction runs, and, when that party is the defendant, that implies either voluntary appearance by him or effective service of process. Fed.Rules Civ.Proc. Rule 65, 28 U.S.C.A.

2. Injunction ⇐ 110

With respect to injunctive power of the district court, question of jurisdiction is always vital; court must have jurisdiction as prerequisite to the exercise of discretion, with question whether court abused its discretion necessarily involving question whether court has any discretion to abuse.

3. Banks and Banking ⇐ 191.30

District court improperly issued preliminary injunction enjoining beneficiary of international letter of guarantee from drawing on that letter, without determining whether court has jurisdiction over beneficiary, an official state-operated oil company in Ecuador.

4. Federal Courts ⇐ 815

On review of grant or denial of preliminary injunctive relief, appellate court is not simply to substitute its judgment for the trial court's, else that court's announced discretion would be meaningless; however, that discretion is not unbridled, and preliminary injunction must be product of reasoned application of factors constituting necessary prerequisites. Fed.Rules Civ. Proc.Rule 65, 28 U.S.C.A.

5. Federal Courts ⇐ 767

In reviewing findings of fact and conclusions of law required to be made when district judge grants or denies preliminary injunction, Court of Appeals must uphold its findings unless they are clearly erroneous; such a limited review is necessitated because grant or denial of preliminary injunction is almost always based on abbreviated set of facts, requiring delicate balancing of the probabilities of ultimate success at final hearing with consequences of immediate irreparable injury which could possibly flow from denial of relief.

6. Federal Courts ⇐ 932
Injunction ⇐ 147

If movant does not succeed in carrying burden on any one of four prerequisites, preliminary injunction may not issue and, if issued, will be vacated on appeal. Fed. Rules Civ.Proc.Rule 65, 28 U.S.C.A.

7. Injunction ⇐ 138.6

Absence of available remedy by which movant can later recover monetary damages may be sufficient to show irreparable injury, in support of preliminary injunctive relief. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

8. Banks and Banking ⇐ 191.10, 191.30

Features of letters of credit, particularly principle of independence of

obligations thereunder from underlying transaction, are of particular importance in international transactions, in which sophisticated investors knowingly undertake such risks as political upheaval or contractual breach in return for the benefits to be reaped from international trade; in that context, requirements for preliminary injunctive relief, including showing of substantial threat of irreparable injury if injunction is not issued, are to be strictly exacted so as to avoid shifting contractual allocation both of risk of loss and burden of pursuing international litigation.

9. Banks and Banking ⇐ 191.30

Party that obtained letter of guarantee for benefit of Ecuadorian official state-operated oil company, to secure performance of contract for sale of gas to that company, failed to show substantial threat of irreparable harm in absence of preliminary injunctive relief enjoining oil company from drawing on the letter; mere fact that money might change hands before dispute was resolved was very purpose of the letter in first instance, and, furthermore, Ecuador was not shown to be forum in which dispute resolution efforts would be futile. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

10. Federal Civil Procedure ⇐ 1269

District court properly ordered further discovery to enable essential facts to be determined concerning whether court had jurisdiction in first instance over Ecuadorian official state-operated oil company, against which preliminary injunctive relief was sought to enjoin company from drawing on international letter of guarantee.

11. Banks and Banking ⇐ 191.30

Inasmuch as standby letter of credit and letter of guarantee were due to expire on day on which the district court heard argument on and granted preliminary injunction, but court did not condition injunction on extension of the letter and guarantee or on posting of bond of equivalent value, the injunctive relief granted impermissibly interfered with the parties' contractual arrangement, requiring remand for vacating of injunction and giving all parties time to exercise their contractual rights under those documents.

Porter & Clements, Joanne M. Vorpahl, Jesse R. Pierce, Houston, Tex., for Corporacion.

Fulbright & Jaworski, J. Todd Shields, Ronald D. Secrest, Houston, Tex., for Bank of America, N.T. & S.A.

Hutcheson & Grundy, Darrel E. Reed, Jr., Kenneth R. Breitbeil, Houston, Tex., for Enterprise.

Vinson & Elkins, D. Bobbit Noel, Jr., Houston, Tex., for First City Nat. Bank of Houston, N.A.

Appeals from the United States District Court for the Southern District of Texas.

Before GOLDBERG, RUBIN, and HILL, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Without deciding whether it had personal jurisdiction over Ecuador's official state-operated oil company, which interposed a challenge to the court's jurisdiction, the district court issued a preliminary injunction prohibiting the Ecuadorian oil company from demanding payment on a letter of guarantee issued by the Ecuadorian branch office of a bank whose main office is in the United States, prohibiting the Ecuadorian branch office from demanding payment on a letter of credit issued by a different bank located in the United States, and prohibiting the United States bank from honoring any such demand on the letter of credit. Because the court acted judicially without making any finding on its challenged jurisdiction over the Ecuadorian oil company, and because, as to the parties who did not challenge the court's jurisdiction, the irreparable injury requisite to the issuance of a preliminary injunction was not shown, we vacate the injunction and remand for further proceedings.

UNITED STATES, *Appt.*,

v.

SAMUEL R. THROCKMORTON et al.

(See S.C., 8 Otto, 61-71.)

Bill by U.S. to set aside confirmation of Mexican grant--frauds--relief when granted--jurisdiction to reform surveys.

1. It is essential to a bill in chancery, on behalf of the Government, to set aside a patent or a confirmation of land title under a Mexican grant, after it has become final, that it shall appear in some way, without regard to the special form, that the Attorney-General has brought it himself, or given such authority for it as will make him officially responsible and show his control of the cause through all stages of its presentation.

2. The frauds for which a bill in chancery will be sustained, to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court and not a fraud which was in issue in that suit.

3. The cases in which such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject-matter of the suit.

4. The Circuit Court of the United States has no original jurisdiction now

to reform surveys, made by the land department, of confirmed Mexican grants in California.

[No. 207.]

Submitted Nov. 11, 1878. Decided Dec. 9, 1878.

Appeal from the Circuit Court of the United States for the District of Columbia.

The case is fully stated by the court.

Mr. **Walter Van Dyke**, *Special Asst. U. S. Atty.*, for appellant:

In the opinion of the court below, it is said "That the alleged frauds are not such extrinsic collateral acts as would justify the interference of equity with the decrees of confirmation;" and the court mentions what it understands by such extrinsic collateral acts, to wit: keeping the adversary's witnesses from court; secreting or purloining his testimony;" or, if the citation to him be given under such circumstances as to defeat its purpose, the court says: "Any conduct of the kind mentioned would tend to prevent a fair trial on the merits, and thus to deprive the innocent party of his rights. So, if a judge sit, when disqualified from interest or consanguinity; if the litigation be collusive; if the parties be fictitious; if real parties affected are falsely stated to be before the court; the judgment recovered may be set aside, or its enforcement restrained," etc.

The question is: do no other fraudulent acts than such as are here enumerated justify a court of equity in setting aside a judgment or restraining its execution? We respectfully submit that the court below, in this respect, restricted the list of such fraudulent acts within too narrow limits, and it only illustrates the danger of attempting to define fraud. It may assume a thousand different shapes, and be perpetrated in as many different ways.

Story, Eq. Jur., sec. 186.

Lord Hardwicke said, in 1859: "Fraud is infinite, and were courts of equity once to lay down rules how far they would go and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive."

Parke, Hist. Ch., p. 508.

Pothier says that the term "fraud" is applied to every artifice made use of by one person for the purpose of deceiving another.

Labeo defines fraud to be any cunning deception or artifice used to circumvent or deceive another.

The law is a practical science, and courts are instituted and designed for practical uses.

There can be no practical difference, whether a party be defrauded out of

a judgment by the collusion of his attorney, by having his testimony stolen, or witnesses kept from court, or whether by any other device, artifice or fraudulent scheme of the opposite party or attorney, which ordinary prudence and foresight could not guard against, he is prevented from presenting his cause or defense and is, therefore, tricked out of a judgment.

Shedden v. Patrick, 1 Macqueen, 535.

That case, on principle, is an authority in these cases. Here, as there, it is charged that one side to the former litigation was possessed of facts which, if known to the other side or court, would have produced a different result, but which were fraudulently concealed. There the case was not dismissed on the objection of *res judicata*, and for the same reason the demurrers here ought not to have been sustained.

Lord Brougham, in *Bandon v. Becher*, 8 Cl. & F., 510, said: "That you may, at all times in a court of competent jurisdiction--competent as to the subject-matter of the suit itself--where you appear as an actor, object to a decree made in another court upon which decree your adversary relies, and you may, either as actor or defender, object to the validity of that decree, provided it was pronounced through fraud, contrivance or covin of any description, or not in a real suit."

Mr. **Delos Lake**, for appellees.

UNITED STATES, Plff. in Err.,

v.

LUTHER JEROME SMULL.

(See S.C. Reporter's ed. 405-412.)

Perjury -- oath authorized by law -- affidavit of homestead applicant -- departmental regulations

1. A charge of perjury under U.S. Crim. Code, § 125, providing that "whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered . . . shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury," may be based upon false statements in an affidavit required either expressly by an act of Congress, or by an authorized regulation of the General Land Office. [Matters as to Perjury, see Perjury, in Digest Sup. Ct. 1908.]

Public lands -- regulation of Land Department -- affidavit by homestead applicant.

2. A regulation of the Land Department requiring an affidavit from the applicant for a homestead entry, stating whether or not he has made other entries, is suitably addressed to the enforcement of the express prohibition

of the homestead laws (act of May 20, 1862 [12 Stat. at L. 393, chap. 75, Comp. Stat. 1913, §4557], § 6; Rev. Stat. § 2289, 2298, 2478; act of March 3, 1891 [26 Stat. at L. 1098, chap. 561, Comp. Stat. 1913, 4530, 4557, 5120] § 5), with respect to the amount of land which any one person may secure under their provisions, the execution of which is confided to the Commissioner of the General Land Office. [For other cases, see Public Lands, I. e, 2, in Digest Sup. Ct. 1908.]

Public lands -- regulation of Land Department -- affidavit by homestead applicant.

3. A department regulation that an applicant for a homestead entry must make an affidavit as to whether he has made other entries is not repugnant to the requirements of U.S. Rev. Stat. § 2290, as amended by the act of March 3, 1891 (26 Stat. at L. 1098, chap. 561, Comp. Stat. 1913, §4531), in relation to the affidavit to be made by such applicant, although the statute, while specific as to certain matters which such affidavit must contain is silent on this subject. [For other cases, see Public Lands, I. e, 2, in Digest Sup. Ct. 1908.]

[No. 598.]

Argued January 7, 1915. Decided February 23, 1915.

In error to the District Court of the United States for the District of Oregon to review a judgment sustaining a demurrer to an indictment for perjury. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Assistant Attorney General Knaebel argued the cause, and, with Mr. S. W. Williams, filed a brief for plaintiff in error:

Without regard to acreage, one enjoyment of the homestead privilege exhausts the right.

Re Thornton, 3 Land Dec. 509; Re Hartzell, 5 Land Dec 124; Stephens v. Ray, 5 Land Dec. 133; Graham v. Hartman, 36 Land Dec. 96.

Where a matter *in pois* is vital to the validity of a homestead application, the Department may require the applicant to show the facts, and show them under oath, even though the literal requirements of U.S. Rev. Stat. § 2290, Comp. Stat. 1913, § 4531, are thereby exceeded.

Leonard v. Lennox, 104 C. C. A. 296, 181 Fed. 760.

The duty to examine the applicant includes the duty, and hence the power, to examine him on oath.

United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; Leonard v. Lennox, supra; United States v. Nelson, 199 Fed. 464; United States v. Hearing, 26 Fed. 744; United States v. Boggs, 31 Fed. 337; United States vs. Hardison,

135 Fed. 419; Caha v. United States, 152 U.S. 211, 218, 38 L. ed. 415, 417, 14 Sup. Ct. Rep. 513; United States v. Minor, 114 U.S. 233, 240, 29 L. ed. 110, 112, 5 Sup. Ct. Rep. 836.

That such oaths were intended to be included by § 125 of the Criminal Code (U.S. Rev. Stat. § 5392) is demonstrated by its broad terms and its evident purpose, illuminated by the statutes from which it was derived.

United States v. Nelson, 199 Fed. 464; Caha v. United States, 152 U.S. 211, 218, 220, 38 L. ed. 417, 418, 14 Sup. Ct. Rep. 513; United States v. Hearing, 26 Fed. 744; United States v. Bailey, 9 Pet. 238, 9 L. ed. 113; United States v. Hardison, 135 Fed. 419.

The circumstance that certain matters to be covered by the claimant's initial affidavit are specified in § 2290 implies no prohibition against his examination under oath upon other matters which are vital to the right of entry.

United States v. George, 228 U.S. 14, 57, L. ed. 712, 33 Sup. Ct. Rep. 412; Leonard v. Lennox, supra; United States v. Hearing, 26 Fed. 744; United States v. Grimaud, 220 U.S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480.

A person who wilfully and corruptly foreswears himself in an effort to defraud the government ought not to receive the protection of refined technicalities. This court has even held that a defendant prosecuted for filing a false affidavit in support of a claim against the government is estopped to deny the validity of his oath.

Ingraham v. United States, 155 U.S. 434, 437, 39 L. ed. 213, 214, 15 Sup. Ct. Rep. 148.

No appearance for defendant in error.

HAZEL-ATLAS GLASS COMPANY
Petitioner,
v.
HARTFORD-EMPIRE COMPANY,
(822 US 238-271.)

Judgment, § 303 -- alteration or setting aside after term.

1. As a general rule federal courts, both trial and appellate, will not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered.

Equity, § 47 -- relief after term from judgment procured by fraud.

2. A court of equity may grant relief against a judgment because of after-discovered fraud, regardless of the term of its entry, but such power should be cautiously exercised. [See annotation reference, 1.]

Equity, § 47 -- Judgment, 303 -- relief against adjudication of infringement of patent -- effect of expiration of term.

3. Equity will set aside a decree in a patent infringement suit that the patent is valid and infringed where both the court and the Patent Office were influenced by fraudulent misrepresentations that the patented device was an advance in the art and where, although the terms of court at which such decree was mandated by a circuit court of appeals and entered by a district court has expired, no equities have intervened through transfer of the fraudulently procured patent or judgment to an innocent purchaser.

Equity, § 48 -- relief against judgment -- lack of diligence.

4. Because of the public interest involved, equitable relief against a judgment obtained by fraud in a patent infringement suit will no6t be denied because the party seeking it has not exercised the highest degree of diligence in uncovering the fraud.

Estoppel, § 65 -- by own wrong -- fraud.

5. Where the plaintiff in a patent infringement suit on appeal from a district court's decision that there had been no infringement, urged upon the attention of the circuit court of appeals a trade magazine article, representing the device in question as an advance in the art, purporting to have been written by a disinterested third person, but in fact prepared by plaintiff, and was successful in obtaining a determination that the patent was valid and infringed, plaintiff is in no position to dispute the effectiveness of the article in bringing about the decision and may not be permitted to escape the consequence of the deceptive attribution of authorship to a third person on the ground that what the article stated was true.

Review, § 10 -- bill of -- power of Circuit Court of Appeals to relieve against own decision obtained by fraud.

6. A circuit court of appeals has both the duty and the power to relieve against a decree entered in a district court pursuant to its mandate, upon a bill of review after the expiration of the term, for fraud practiced upon it, and is not bound to remit the complainant to the district court for relief. [See annotation reference, 2.]

Equity, § 47 -- relief against fraudulent judgment -- nature of remedy.

7. Equitable relief against fraudulent judgments is not of statutory creation, but is a judicially devised remedy fashioned to relieve hardships which from time to time arise from a hard and fast adherence to the court-made rule that judgments should not be disturbed after the term of their entry has expired.

Review, § 15 -- application to appellate court for leave to file bill -- necessity.

8. Where a judgment, the setting aside of which is sought by bill of review, was entered upon the mandate of an appellate court, permission to file the bill must be sought in the appellate court upon appropriate averments supported by affidavits or other acceptable evidence; and such court may, in exercise of a proper discretion, reject the petition, in which case the bill of review cannot be filed in the lower court. [See annotation reference, 2.]

Dismissal and Discontinuance, § 17 -- involuntary -- suit for infringement of patent.

9. Fraud in obtaining a patent for an invention, and in representations to the court bearing on the question of its validity, requires a complete denial of relief to the patentee against a claimed infringement.

Patents, § 361 -- vacation -- who may sue.

10. Vacation of a patent for an invention because of fraud in obtaining it can only be accomplished in a direct proceeding brought by the Government, and may not be decreed in a suit for its infringement.

[No. 398.]

Argued February 9 and 10, 1944. Decided May 15, 1944. Rehearing denied June 12, 1944.

-NOTES-

(2)

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

No. 91-1702

In the Supreme Court of the United States

OCTOBER TERM, 1991

CARL W. CORTEZ, PETITIONER

v.

FIRST CITY NATIONAL BANK OF HOUSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ALFRED J.T. BYRNE
General Counsel

JACK D. SMITH
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
Senior Counsel

J. SCOTT WATSON
Senior Attorney
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal for lack of jurisdiction when the notice of appeal was filed 102 days after the final order dismissing petitioner's action, and no timely motion for reconsideration had tolled the period for filing a notice of appeal.

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In the Supreme Court of the United States

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No. 91-1702

CARL W. CORTEZ, PETITIONER

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FIRST CITY NATIONAL BANK OF HOUSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) dismissing the appeal is unreported. The opinion of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1991. A petition for rehearing was denied on December 2, 1991. The petition for a writ of certiorari was filed on February 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner filed an action against five banks in the United States District Court for the Southern District of Texas, Houston Division. The action alleged fraud, constructive fraud, breach of warranty, violations of the Racketeer Influenced and Corrupt Organizations Act, violations of the federal Electronic Fund Transfer Act, conversion, and negligence. In 1987, the district court dismissed the case with prejudice, noting that petitioner had demonstrated "among the worst examples of bad faith in litigation that [the judge had] seen." The district court entered judgment on behalf of the banks and imposed sanctions against petitioner. Pet. App. A4.[1]

Petitioner filed a motion for reconsideration, alleging a fraud on the court. The motion for reconsideration was denied. Petitioner then sought to appeal the judgment to the Fifth Circuit *in forma pauperis*, but leave to appeal without paying the docketing fee was denied. When petitioner failed to pay the appropriate fee, the case was dismissed. Pet. App. A4. Petitioner filed a petition for a writ of certiorari, which this Court denied, and a petition for rehearing, which was also denied. *Cortez* v. *Price*, 489 U.S. 1024, rehearing denied, 489 U.S. 1100 (1989).

2. Petitioner then filed a complaint in the United States District Court for the Middle District of Florida styled as an "Independent Action for Relief from Judgment—Fraud" pursuant to Federal Rule of Civil Procedure 60(b). The complaint challenged a judgment imposing sanctions against petitioner for filing "frivolous litigation." Pet. App. A4-A5. The action named as defendants the same five banks, or their successors-in-interest, that had been defendants in the 1985 Texas

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[1] Those banks were First City National Bank of Houston, MBank Houston, MBank Memorial, Peoples Bank, and Petrobank.

lawsuit. One of the banks filed a motion to have the case transferred to the United States District Court for the Southern District of Texas. The Federal Deposit Insurance Corporation, as receiver for MBank Houston (FDIC-Receiver), also moved the district court to dismiss the complaint, or in the alternative, to transfer the case to the district court in Texas.[2]

On April 11, 1990, the district court in Florida transferred the case to the district court in Texas pursuant to 28 U.S.C. 1404(a). Petitioner filed a motion for reconsideration of that order, which was denied. On July 5, 1990, petitioner filed a petition for writ of mandamus in the Eleventh Circuit. On July 13, 1990, petitioner also appealed the district court's denial of his motion for reconsideration to the Eleventh Circuit. On November 9, 1990, the court of appeals denied the petition for writ of mandamus. On December 12, 1990, the court of appeals dismissed the appeal for lack of jurisdiction, holding that the order transferring the case was not a final appealable order.[3]

3. On April 4, 1991, the district court in Texas entered a final order of dismissal and an injunction. The district court's memorandum opinion noted that, in the original 1985 lawsuit, after exhibiting "among the worst examples of bad faith in litigation that this Court has seen" and after failing to pay the sanctions imposed against him, petitioner then waited over two years to seek relief under Rule 60(b). Pet. App. A5. The district court dismissed the action, finding that petitioner failed

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[2] See Appellees' Mem. Regarding Jurisdiction, *Cortez* v. *First City National Bank*, No. 90-3718 (11th Cir. filed Sept. 1990); Def. FDIC's Mot. to Dismiss Compl., *Cortez* v. *First City National Bank*, No. 90-12-Civ-T-17-B (M.D. Fla. filed Apr. 11, 1990).

[3] The court of appeals' rulings were made in unpublished orders in *In re Cortez*, No. 90-3636 (11th Cir. Nov. 9, 1990); *Cortez* v. *First City National Bank*, No. 90-3718 (11th Cir. Dec. 12, 1990).

to satisfy the elements that must be met before an independent action can be used to challenge a prior judgment. Pet. App. A4-A5. In so doing, the district court found that petitioner's claims were frivolous, and that prior monetary sanctions remained unpaid and had proved unsuccessful in deterring petitioner from filing such frivolous litigation. Relying on *Farguson* v. *MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986), and other authority, the district court enjoined petitioner from filing "any similar litigation against these defendants, their agents, successors or attorneys" until petitioner paid the prior sanctions and obtained leave of the court. Pet. App. A5.

On April 23, 1991, petitioner filed a petition under Federal Rule of Civil Procedure 55(e) requesting the district court to set aside its order of April 4, 1991. On May 17, 1991, the district court denied that petition. Pet. App. A2.

4. On July 15, 1991, petitioner filed an appeal in the Fifth Circuit. Appellee FDIC-Receiver filed a motion to dismiss the appeal for lack of jurisdiction as untimely, because it was filed 102 days after the April 4, 1991, final order dismissing the case. On October 30, 1991, the court of appeals dismissed the appeal for lack of jurisdiction, and denied a petition for rehearing on December 2, 1991. Pet. App. A1.

ARGUMENT

The court of appeals correctly dismissed petitioner's untimely appeal for lack of jurisdiction. The court's decision does not conflict with any decision of this Court or of any other court. Accordingly, review by this Court is not warranted.

1. Petitioner contends (Pet. 6-12) that the court of appeals violated his right to equal protection by failing to reverse the district court order denying him relief from

an entry of sanctions in an earlier lawsuit. Petitioner fails to address the lack of jurisdiction in the court of appeals, which required dismissal of the appeal.

The time period for filing an appeal is mandatory and jurisdictional. *Smith* v. *Barry*, 112 S. Ct. 678, 680 (1992) ("Rule 3 of the Federal Rules of Appellate Procedure conditions federal appellate jurisdiction on the filing of a timely notice of appeal."); *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*, 361 U.S. 220, 229 (1960). The purpose of the rule is clear: it sets a definite point in time when litigation shall end. *Browder*, 434 U.S. at 264. Pursuant to Fed. R. App. P. 4(a)(1), the notice of appeal in a civil case must be filed "within 30 days after the date of entry of the judgment or order appealed from."

Petitioner's notice of appeal was filed 102 days after the district court's final order of April 4, 1991. The court of appeals therefore lacked jurisdiction to hear the appeal. His petition for reconsideration in district court did not toll the period for filing a notice of appeal. It was filed April 23, 1991, more than ten days after the final order of April 4, 1991. A motion under Rule 59 must be filed within ten days of judgment in order to toll the time for filing an appeal. An untimely motion under the rules of civil procedure "could not toll the running of time to appeal under Rule 4(a)." *Browder*, 434 U.S. at 265. Thus, petitioner's notice of appeal was untimely, and the court of appeals properly dismissed the appeal for lack of jurisdiction.

2. In any event, the district court properly dismissed petitioner's independent action for relief from the 1987 sanctions judgment. The essential elements to maintain an independent action for relief from judgment are: (1) that equity and good conscience preclude enforcement of the prior judgment; (2) there exists a good defense to the cause of action upon which the judgment is founded; (3)

fraud, accident, or mistake prevented the defense from being asserted; (4) the party challenging the judgment is free from fault or neglect; and (5) there is no adequate remedy at law. *Bankers Mortgage Co.* v. *United States*, 423 F.2d 73, 79 (5th Cir.), cert. denied, 399 U.S. 927 (1970); *National Surety Co.* v. *State Bank*, 120 F. 593, 599 (8th Cir. 1903). Here, the district court determined that petitioner failed to demonstrate that the prior judgment, which imposed sanctions for filing frivolous litigation and for exemplifying bad faith in litigation, should not be enforced. Pet. App. A5. Petitioner also failed to allege a good defense to the sanctions which he was prevented from asserting by reason of fraud, and failed to demonstrate that he was free from fault or neglect. *Ibid.* These findings are within the sound discretion of the district court, and are reviewable on appeal only for abuse of discretion. *High* v. *Zant*, 916 F.2d 1507 (11th Cir. 1990), cert. denied, 111 S. Ct. 1432 (1991). It was not an abuse of discretion to conclude that petitioner had not been prevented from asserting his defense where petitioner had alleged fraud in a motion to reconsider the original sanction judgment, that defense was rejected in a denial of the motion, Pet. App. A4, and an appeal of the denial of the motion was dismissed.

3. Even if petitioner had filed a timely appeal before the court of appeals, petitioner would not have been entitled to relief from the injunction. Petitioner argues (Pet. 12) that the court of appeals' order was "unlimited and unspecific" and that it therefore violated his First Amendment right to petition the government in that it precludes him from instituting further lawsuits against these defendants. That contention is in error. First, the district court's injunction only prohibits petitioner from filing an action relating to the subject matter of this lawsuit against these five particular defendants. The injunction is specific and limited, and serves to effectuate

the district court's judgment and protect these defendants from further litigation on claims which twice were found to be frivolous. Such an injunction is a proper exercise of the district court's authority. *Farguson* v. *MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986). Second, where monetary sanctions are ineffective in deterring vexatious filings, enjoining such filings is appropriate. *Farguson*, 808 F.2d at 360; *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ALFRED J.T. BYRNE
General Counsel
JACK D. SMITH
Deputy General Counsel
DOROTHY L. NICHOLS
Associate General Counsel
ANN S. DUROSS
Assistant General Counsel
RICHARD J. OSTERMAN, JR.
Senior Counsel
J. SCOTT WATSON
Senior Attorney
Federal Deposit Insurance Corporation

JUNE 1992

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[4] Petitioner's reliance on *Enterprise International, Inc.* v. *Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464 (5th Cir. 1985) is misplaced. The court there examined the elements for granting a preliminary injunction sought by a party; it did not address the court's ability to effectuate its judgment by injunction.

Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

(3)

No. 91-1702

In the Supreme Court of the United States

October Term, 1991

CARL W. CORTEZ, PETITIONER

v.

FIRST CITY NATIONAL BANK OF HOUSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR CARL W. CORTEZ, PETITIONER

Carl W. Cortez, Pro se
801 Main #42
Dunedin, Florida 34698

(813) 736-8125

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly dismissed the petitioner's appeal for lack of jurisdiction when the notice of appeal was filed in a timely manner and a timely motion for reconsideration had tolled the period for filing a notice of appeal?

2. Whether the failure of the respondents to send the petitioner copies of their motions to the court absolves the petitioners from any failure to address issues raised in the respondent's motions?

3. Whether the court must consider only issues presented by questions in the respondent's brief?

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Constitution Statute and Rules:
28 U.S.C. 1254 (1)
Supreme Court Rule 14 (a)
Supreme Court Rule 15
Fed. R. App. P. 4
Fed.R. Civ. P. 6(e)

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1. The respondants are: Federal Deposit Insurance Corporation, First City National Bank of Houston, M Bank Houston, M Bank Memorial, Peoples Bank, Petrobank, and Village Bank

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) dismissing the appeal is unreported. The opinion of the district court (Pet. App. A3-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1991. A petition for rehearing was denied on December 2, 1991. The petition for a writ of certiorari was filed on February 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 4, 1991 the district court, Houston, Texas, entered a final order of dismissal and an injunction.

2. On April 16, 1991 the petitioner filed a petition for rehearing in the district court. On May 17, 1991 the district court denied the petition for rehearing.

3. On July 15, 1991 the petitioner filed an appeal in the Fifth Circuit Court of Appeals. The court dismissed the appeal for lack of jurisdiction on October 30, 1991. The petition for rehearing was denied on December 2, 1991.

ARGUMENT

The court of appeals incorrectly dismissed the petitioner's appeal for lack of jurisdiction. The appeals court's decision is in conflict with decisions of this court and every other court. Accordingly, review by this court is warranted.

1. Respondent claims that the petitioner's appeal was untimely as the appeal was filed 102 days after the final order of dismissal on April 4, 1991 is a misstatement. The district court's final order and injunction was received by the petitioner, in Dunedin, Florida, on April 8, 1991, and a petition for rehearing was filed by the petitioned on April 16, 1991. Rule 6(e) of the F.R.C.P. allows an additional 3 days when notice is served upon a party by mail. Petitioner had 13 days to file his post-trial motion and did therefore toll this period for filing a notice of appeal.

2. The district court denied the petition for rehearing on May 17, 1991. The petitioner filed a notice of intention to appeal, in the district court on July 15, 1991. Rule 4 of appellate procedure requires that if the United States, or an officer or agency is thereof a party the notice of appeal may be filed in 60 days. The petitioner's notice of intention to appeal did toll the period for filing, therefore, the court of appeals improperly dismissed the appeal for lack of jurisdiction.

3. Respondent claims (R-5) "petitioner fails to address the lack of jurisdiction in the court of appeals, which required dismissal of the appeal." The respondent failed to advise the Court, in his brief, that the FDIC filed a motion to dismiss on September 24, 1991, and the FDIC did intentionally fail

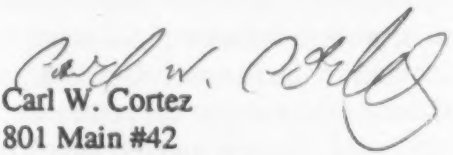
to send a copy of their motion to dismiss, to the petitioner. The petitioner learned of the motion to dismiss only because of a phone call to the clerk of the court of appeals. The petitioner filed a motion in response to the FDIC's motion to dismiss on September 30, 1991, and by affidavit and evidence presented with the motion in response showed the court that no copy of the respondent's motion to dismiss had been sent to the petitioner and that he could not respond to whatever statements the FDIC may have made to the court in their motion to dismiss, and further, evidence presented to the court of appeals in the motion in response showed that the respondents had filed motions in the Eleventh Circuit Court of Appeals on September 20, 1990 and did not send a coy to the petitioner. The court of appeals did not rule on the motion in response and did improperly dismiss the appeal for lack of jurisdiction.

4. The only question presented for the court's review in the respondent's brief is whether the court of appeals properly dismissed the petitioner's appeal for lack of jurisdiction [B-(1)] yet, the arguments in the respondent's brief [R-5(2)] contain arguments that were not raised by questions and should therefore not be considered by the court, Rule 14(a) further the respondant is obligated to point out any perceived misstatements in his brief in opposition (Rule 15). The petition for writ of certiorari alleges that 3 separate acts of perjury were committed by a branch of the United States Government, and others, and that 25 separate acts of fraud upon the court were committed by a branch of the United States Government, and others. The brief of the respondent failed to address these very serious allegations nor was it stated in the brief in response that the allegations of perjury and fraud were misstatements.

CONCLUSIONS

The court of appeals improperly dismissed the appeal for lack of jurisdiction. The petitioner could not address the issue of jurisdiction in the court of appeals when the respondent failed to send him a copy of their motion to dismiss. The court should address only the issue raised by question in the brief in response. The petition for a writ of certiorari should be granted.

Respectfully submitted,



Carl W. Cortez
801 Main #42
Dunedin, FL 34698

(813) 736-8125

2. The petitioner's reliance on Enterprise International Inc. v. Corporacion Estatol Petrolera Ecuatoriana, 762 F. 2nd 464 (5th Circuit) is approprate.

NOTES

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